1-22-1974

Memo to the National News Council Members

Benno C. Schmidt Jr.

Memorandum

To: National News Council

From: Benno C. Schmidt, Jr.

Re: Docket Schedule of the Miami Herald case

You may have noted that the Supreme Court accepted the Miami Herald case for plenary consideration. Technically, the Supreme Court "postponed the question of jurisdiction to a consideration of the merits," which leaves open the possibility of a denial of jurisdiction at a later date. But in any event, the case will receive full-dress treatment. The case will be set for full-scale briefing and arguing under the following schedule: the Miami Herald should file its brief on the merits by February 28th. Tornillo should file the appellee's brief on the merits by March 30th. The oral argument is not scheduled until the briefs are filed, but the Clerk's office at the Supreme Court tells me to expect oral arguments during the week of April 22nd, the last week for arguments this term. Given the Court's procedures and the importance and complexity of the case, I would anticipate that the Court's decision would be handed down near the end of the current term, which usually occurs toward the end of June.

In terms of the possible impact of Council action with respect to the access question, this schedule means that the Council's position should be disseminated before the end of April if the Council is to have any effect on the views of the Justices in their conference of April 26th. Opinion writing in the Miami Herald case will not begin until May, and therefore the Council's position might have an impact on the opinions of the Court if its decision is disseminated by May 15th or so.

There is a chance that after briefing and arguing the Court will decline to rule on the constitutionality of the Florida statute on the ground that the Miami Herald case is not "ripe" for decision, as I explain in the attached statement of the facts of the case. Moreover, if the Court decides to rule on the merits, I believe there is a substantial possibility that the Miami Herald case will be held over until the term of Court beginning in October 1974 in view of the importance and difficulty of the case and the very limited time available to the court to produce a judgment during the present term. As of this date, however, we must assume that judgment will be handed down in June, 1974.

Benno C. Schmidt, Jr.

BCS:el
January 22, 1974

The Facts

The factual background of the Miami Herald case is reasonably simple, although the constitutional ramifications are complex. During the fall of 1972, Pat L. Tornillo, Jr. ran for the Democratic Party nomination for the Florida House of Representatives. Tornillo had attracted the Herald's attention previously in his capacity as the head of the Dade County Classroom Teachers' Association, a group of some 8,000 local public school teachers which in 1968 had participated in a statewide strike of public school teachers. These events had involved Tornillo in civil and criminal litigation under "no-strike" laws and the like.

The primary election was scheduled to take place on October 3, 1972. On September 20, 1972, the Miami Herald ran its first editorial concerning Tornillo's candidacy:

> THE STATE'S LAWS AND PAT TORNILLO
>
> LOOK who's upholding the law!
>
> Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct.3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."
>
> Czar Tornillo calls "violation of this law inexcusable."
>
> This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.
>
> We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

Tornillo responded a few days later with the following letter to the Herald:

September 27, 1972

FROM: PAT L. TORNILLO, JR.
CTA Executive Director
1809 Brickell Avenue
Miami, Florida 33129

Legislative Candidate, District 103

TO: MIAMI HERALD
One Herald Plaza
Miami, Florida

PAT TORNILLO AND THE CTA RECORD

Five years ago, the teachers participated in a statewide walkout to protest deteriorating educational conditions.

Financing was inadequate then and we now face a financial crisis.

The Herald told us that what we did was illegal and that we should use legal processes instead. We are doing just that through legal and political action.

My candidacy is an integral part of this process.

During the past four years:

- CTA brought suit to give Dade County its share of state money to relieve local taxpayers.

- CTA won a suit which gave public employees the right to collectively bargain.

- CTA won a suit which allowed the School Board to raise $7.8 million to air-condition schools and is helping to keep this money.

Unfortunately, the Herald dwells on past history and ignores CTA's totally legal efforts of the past four years.

We are proud of our record.

The Herald, however, was not persuaded, and went after Tornillo in a second editorial on September 29th, just three days before the primary election:

SEE PAT RUN

[Picture of empty classroom]

FROM the people who brought you this - the teacher strike of '68 - come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us - what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

To this editorial, Tornillo responded the next day with a formal request to exercise his statutory right of reply:

FROM: Pat L. Tornillo, Jr.,
CTA Executive Director
and Candidate (Dem.) for
State Rep., Dist.103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the Herald has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statute 104.38, the Herald print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive $7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its President.

Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

The statute on which Tornillo relied in his September 30th request reads as follows:

> 104.38 Newspaper assailing candidate in an election; space for reply
>
> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

So far as the state court litigation reveals, the Herald did not respond to Tornillo, and on October 1st Tornillo sued the Herald seeking an injunction to order the Herald to print his reply, and damages. The next day Judge Christie of the Circuit Court, Dade County, held an emergency hearing at the conclusion of which he entered an oral ruling that section 104.38 was unconstitutional as an impermissible restraint on freedom of the press and, in addition, because the statute was unconstitutionally vague. Judge Christie elaborated on his judgment in a written opinion filed on October 20th. He analogized statutes directing publication with those prohibiting publication, and accordingly tested the right of reply statute in terms of whether it protected "a substantial public interest threatened by a clear and present danger." Judge Christie also held section 104.38 unconstitutionally vague: "[n]o editor could know from the statute exactly what words would offend the statute or the scope of the reply intended to be mandated." In the meantime, Tornillo appealed Judge Christie's ruling, and on October 3rd he lost

the primary election.

On July 10, 1973, the Florida Supreme Court reversed per curiam. Because the trial court had held the reply statute unconstitutional on its face, the Florida Supreme Court made no mention whatever of the facts of the Tornillo situation. Instead, it analyzed the reply statute at large and in the abstract, and concluded that the statute served an essential governmental purpose, that of "maintaining conditions conducive to free and fair elections," which did not conflict with first amendment principles: "[t]he entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate." Following along this Meiklejohnian tack, the court pointed out that the reply statute:

> "is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information."

The court concluded that the reply statute was designed to enhance freedom of the press in the face of growing concentration of ownership of the mass media. The first amendment did not create "a privileged class which through a monopoly of instruments of the newspaper industry would be able to deny to the people the freedom of expression . . . ."

Having thus disposed of the basic first amendment issues, the Florida Supreme Court quickly dispensed with vagueness objections. The court pointed to its duty to construe the reply statute so as to resolve constitutional doubts, but the only portion which it explicated was the term "any reply":

> "the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane."

The decisions of the Florida courts leave open the vagueness questions about the Florida statute, except for the attention given to the meaning of "any reply" quoted above. Because the constitutionality of the statute was adjudicated on its face, rather than in light of the particular facts of the Tornillo controversy, the Supreme Court may well consider the vagueness objections to the statute as not ripe for decision. Whether the Court remands the case back to Florida for further consideration by the state courts in light of the particular facts of the case will depend on the Court's view of the constitutional merits. In other words, the ripeness of this issue for constitutional adjudication turns on whether the Court finds further factual information and more definite construction necessary to decide the constitutional questions presented. If the Court feels that right of reply statutes are per se unconstitutional, the lack of ripeness would not be an obstacle to a decision on the merits. By the same token, if the Court feels that the terms of the Florida statute are either so sweeping or so indefinite that no narrowing construction is viable, the Court would hold the statute void for vagueness on its face. On the other hand, if the Court believes that reply statutes may be constitutional as a general matter, and that the terms of the Florida statute are susceptible of definite construction, the Court would probably remand the case for further state proceedings which would apply the statute in a specific factual setting.

Thus, the Court's response to the ripeness problem will depend on how broad or narrow its view of the first amendment principles governing a statutory right of reply to newspapers.